No. 96-795

(10)

In the Supreme Court of the United States

October Term 1996

ALLENTOWN MACK SALES & SERVICE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ Of Certiorari To The United States Supreme Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus American Trucking Associations, Inc., addresses the following question:

> Whether an employer with objective evidence that a bargaining representative has suffered a significant loss of employee support may conduct a fair and non-coercive poll of employees to determine if the bargaining representative continues to have the support of a majority of employees, without thereby committing an unfair labor practice.

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INTEREST OF THE AMICUS

The American Trucking Associations, Inc. ("ATA"), a not-for-profit corporation, is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interest of the trucking industry. The ATA membership includes more than 4,500 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 34,000 member companies and every type and class of motor carrier operation in the United States. ATA regularly advocates the trucking industry's common interests before this Court and other courts.[1/]

ATA, on behalf of a motor carrier industry employing millions of workers, is deeply interested in the proper interpretation and fair enforcement of federal labor laws by the National Labor Relations Board ("NLRB" or "Board"). The specific issue in this case is of direct concern to ATA and its members. Faced with objective evidence that a union previously certified or recognized as a bargaining representative has suffered a significant loss of employee support, ATA believes that an employer must be able to conduct a poll to determine whether the union still commands a majority. Otherwise, the employer risks bargaining with a union that repre-

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[1/] The written consents of the parties to the filing of this amicus brief have been filed with the Clerk.

sents only a minority of the workforce—bargaining which is contrary to the employer's economic interests, which may also constitute an unfair labor practice by the employer, and which is unfair to the majority of workers who do not desire the union's representation.

More generally, ATA has a strong interest in maintaining the legality of non-coercive, employer-initiated polling. As the number of union employees in the U.S. workforce has fallen, including in the trucking industry, labor organizations have increasingly turned to organizing tactics that circumvent the traditional secret ballot election process, thereby calling into question the quality and quantity of support for union representation among employees. An employer's right to poll its employees is one of the most conclusive ways to determine whether sufficient support exists to recognize a labor union as the exclusive bargaining representative, as well as to determine the continuing level of support for an incumbent union.

The history of the trucking industry is the history of the U.S. labor movement. The largest labor organization, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America ("Teamsters"), has its roots in organizing truck drivers. Teamsters' membership has risen and fallen with the market strength of organized trucking employers. Since the trucking industry was deregulated in 1980, a large number of niche trucking companies have entered the market to compete with the larger, organized motor carriers. Teamster membership began a substantial decline contemporaneous with deregulation, falling from 1.9 million in 1979 to 1.2 million in 1995. This drop in

membership has lead the Teamsters to turn to non-traditional methods of organizing to obtain representation status, including "corporate campaigns."

This new organizing strategy bypasses the traditional secret ballot election conducted by the Board. Instead, the union strives to coerce the employer into "voluntarily" recognizing the union. In such circumstances, non-coercive employer polling is one of the few tools available to demonstrate that a union has not garnered the support of a majority of the employees.

The Teamsters Union has publicly targeted ATA members for corporate campaigns. Consequently, ATA's participation as amicus curiae will give the Court a broader perspective on the important legal question presented in this case.

SUMMARY OF ARGUMENT

Amicus ATA urges this Court to reject as arbitrary and capricious the severe limitation on non-coercive polling adopted by the Board and approved by the court of appeals' majority in this case. By prohibiting polling except when the employer otherwise knows that the union has lost majority support, the Board has rendered polling virtually useless. The Board's restrictions on polling make no sense as a practical matter. To the contrary, they produce bizarre results like that in this case, where the employer has been held to have committed an unfair labor practice by conducting a procedurally impeccable poll that disclosed that only 40 per cent of bargaining unit members wanted to be represented by the union. There is no conceivable justification for prohibiting a practice that benefits employer and employee alike

by thus exposing a bargaining representative's minority status.

This Court should approve instead the position of the three circuits that have permitted polling where an employer has objective evidence of a significant loss of union support. Polling in those circumstances permits an employer who has reason to believe that the union *may* have lost majority support to obtain precise and reliable data as to the union's status—data that it would be difficult or impossible for the employer to obtain by other means. Allowing polling based upon evidence of a significant loss of support—subject to the procedural safeguards set out in *Struksnes Construction Co.*, 165 N.L.R.B. 1062 (1967), which are designed to ensure that polling is fair and non-coercive—is essential if employers are to avoid the economic and legal harms that may result from bargaining with a union that does not represent a majority of bargaining unit workers, and furthermore serves to enhance employees' right of free choice.

ARGUMENT

I. THE BOARD'S REFUSAL TO PERMIT POLLING ON THE BASIS OF EVIDENCE OF A SIGNIFICANT LOSS OF SUPPORT FOR THE UNION DESTROYS IMPORTANT EMPLOYER AND EMPLOYEE RIGHTS AND IS IRRATIONAL

A. Polling Protects Substantial Employer And Employee Interests

Both employers and employees have substantial interests in ensuring that only a union with majority support is recognized as a bargaining representative. Employers are severely harmed by rules that foreclose reasonable efforts to determine the status of the union in at least two ways. To begin with, an employer bears an unnecessary and heavy economic burden when, as a result of Board policies that prevent it from accurately testing the level of union support, it is forced to bargain with a union that represents only a minority of the workforce. Second, an employer is at some legal risk of violating NLRA Section 8(a)(2), 29 U.S.C. § 158(a)(2), when it bargains with a minority union. The majority below described an employer's risk of violating Section 8(a)(2) as "nonexistent" on the ground that "the employer is protected by the presumption of the union's continuing majority status." Pet. App. 7. However, it would be surprising if that presumption afforded an employer complete protection, for when more than a year has passed since certification of the bargaining representative (or three years from the commencement of a collective bargaining agreement) the presumption may be rebutted. *Auciello Iron Works, Inc.* v. *NLRB*,

116 S. Ct. 1754, 1758 (1996); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 777-778 (1990).

Employees also are harmed when an employer's ability to test the level of support for the union is too restricted. "[T]he statutory goal of employee free choice" is obviously disserved when a union with only minority support acts as bargaining representative. *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1060 (1989). Logically, employee free choice is maximized when workers are given reasonable opportunities to indicate that they no longer support their bargaining representative and when an employer is permitted to withdraw recognition of the union based on that expression of its employees' wishes.

Current Board law gives grossly inadequate weight to these employer and employee interests in having the employer determine the status of a union that appears to be losing support. If the employer *already has objective evidence that the union has lost the support of a majority of bargaining unit members*, then according to the Board it may "simply withdraw recognition of the union; or it may seek a Board-conducted election—an 'RM election' —pursuant to § 9(c)(1)(B), 29 U.S.C. § 159(c)(1)(B); or it may conduct a poll of employees." Pet. App. 3. This scheme, however, merely gives lip service to what the Board itself has recognized as "an employer's right to poll." *Texas Petrochemicals*, 296 N.L.R.B. at 1061. To limit polling in this way makes it quite useless and redundant: as the Sixth Circuit explained, "[u]nder the Board's analysis, an employer would only be allowed to take a poll under circumstances where no poll was necessary; the only value of the poll would be to double-

check the employer's already sufficient evidence to refuse to bargain." *Thomas Indus., Inc.* v. *NLRB*, 687 F.2d 863, 867 (6th Cir. 1982); accord *Mingtree Restaurant, Inc.* v. *NLRB*, 736 F.2d 1295, 1297 (9th Cir. 1984) (under the Board's approach, "an employer in doubt of the union's majority status ..ould be allowed to take a poll only when it had no actual need to do so, that is, when it already had sufficient objective evidence to justify withdrawal of recognition"; that "is tantamount to an outright prohibition of employer-sponsored polls").

Polling's real utility, where there is an incumbent union, is as a means to gather evidence to meet the Board's standard for withdrawing recognition or conducting an RM election. See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 41 n.8 (1987) (an employer's burden is to "'show that the union had in fact lost its majority status'" or to demonstrate "'a good-faith doubt based on objective factors that the union continued to command majority support'"). Polling is "a useful and legitimate tool when the employer's sincere doubt of the union's majority status is based on objective evidence which falls short of that needed to justify withdrawal of recognition." *NLRB* v. *A.W. Thompson, Inc.*, 651 F.2d 1141, 1145 (5th Cir. 1981). The requirement that any poll be based upon "substantial, objective evidence of a loss of union support" and that it comply with *Struksnes*' stringent procedural rules is, as the Fifth Circuit correctly determined, "a reasonable accommodation of the employer's interest in testing the union's support and the Board's interest in preventing repeated polls which themselves can be coercive." *Ibid.* The Board's view that polling should be restricted to circum-

stances in which the employer has no reason to poll, in contrast, is irrational.

B. Polling Is The Most Accurate And Least Disruptive Method To Determine The Union's Status

If polling cannot be used to gather data, it will often be difficult or impossible for an employer who knows that the union is losing support to take the necessary additional step to gather objective evidence that the union has lost its majority. Where an employer has objective indications that a union has suffered a significant loss of support, polling provides the most effective, most accurate, and least disruptive means to determine the union's status, which is in turn an essential predicate for taking the further actions of withdrawing recognition or calling for an RM election.

The Board's primary reason for so severely limiting polling appears to be its assertion that "polling employees about their continued support for an incumbent union is itself potentially, if not inherently, both disruptive of the collective-bargaining relationship between an employer and a union and also unsettling to the employees involved." *Texas Petrochemicals*, 296 N.L.R.B. at 1061. As a justification for the Board's prohibitive restrictions on polling, this assertion does not bear up to examination.

Without the ability to poll on the basis of objective evidence of a significant loss of support, an employer has two choices. It can simply continue to bargain with a union that is losing support and that may well represent only a minority of the bargaining unit, contrary to

its own economic and legal interests and to its employees' interest in free choice. Alternatively, it can attempt to obtain evidence that the union has lost majority support by means other than polling. That effort will be difficult, and it may sometimes be impossible. See *Curtin Matheson*, 494 U.S. at 797 (Rehnquist, C.J., concurring) (expressing "considerable doubt whether the Board may insist that good-faith doubt be determined only on the basis of sentiments of individual employees, and at the same time bar the employer from using what might be the only effective means of determining those sentiments"). It will certainly involve less direct and less reliable methods than polling. And it is difficult to imagine how the employer could gather the necessary information in a less "disruptive" and "unsettling" way than by a poll conducted in accordance with the safeguards mandated by *Struksnes*.

Once the employer has gathered evidence of loss of support by other means, it will likely withdraw its recognition of the union, as the Board's position permits. Only when the unfair labor practice charge is filed challenging the withdrawal of recognition—a charge almost certain to be brought—will the employer "find out whether the evidence of loss of support is sufficient to justify that withdrawal." *A.W. Thompson*, 651 F.2d at 1145. In other words, after gathering evidence of the union's status in a way that is very likely to be more disruptive than polling, the employer will withdraw recognition and then will face an unfair labor practice charge that will determine if its withdrawal of recognition is justified!

It is a mystery how the Board can suppose that this process is less disruptive than taking a poll that is based on objective evidence of significant loss of support for the union, that is conducted in accordance with *Struksnes*, and that produces concrete, reliable evidence as to the union's status. Certainly, the Board and the court below have not explained: notably missing from the opinions in this case and from the Board's defense of its position in *Texas Petrochemicals* is any discussion at all of how an employer is to gather objective evidence of loss of majority support if it cannot poll, of how "disruptive" or "unsettling" other methods of gathering this data might be in comparison with polling, or of how "disruptive" or "unsettling" it is to have the employer withdraw recognition to test the sufficiency of its evidence of loss of support.

It is quite clear, ATA submits, that polling is significantly *less* disruptive of the collective-bargaining relationship and less unsettling for employees than the odd and irrational scheme established by the Board. The Board's failure even to consider these issues is further indication that its polling rule is arbitrary and capricious and should not be accepted by this Court.[2/]

[2/] A second reason that the Board has given for its standard for polling is a desire to maintain the same standard for RM elections, employer polls, and withdrawals of recognition, because all three have the same consequence—loss of union recognition—and because the Board wishes to encourage use of RM elections. *Texas Petrochemicals*, 296 N.L.R.B. at 1060-1061. As even the court of appeals' majority recognized, this reasoning is internally inconsistent and deeply flawed. See Pet. App. 7-8. Far from encouraging employers to seek RM elections, the Board's approach encourages them simply to withdraw recognition, and to do so not on the basis of fair and accurate polling but on the basis of potentially less reliable data. The only way that the three techniques meld coherently together, ATA submits, is if polling is permitted, upon evidence of loss of support, as a method to obtain the data which may then form the basis of withdrawal of recognition or a request for an RM election.

II. THE BOARD'S REFUSAL TO PERMIT POLLING ON THE BASIS OF EVIDENCE OF A SIGNIFICANT LOSS OF SUPPORT FOR THE UNION LEADS TO BIZARRE RESULTS

The facts of this case illustrate well the importance of "effectively preserving an employer's right to poll" its workforce about their support for their union. *Texas Petrochemicals*, 296 N.L.R.B. at 1061. Here, polling enabled the employer to determine that a union had ceased to represent a majority of the bargaining unit. The Board's and court of appeals' decisions that the employer thereby committed an unfair labor practice provides an excellent example of the absurd results that flow from a rule limiting employer polling to situations where the employer has no incentive to poll, while barring polling in situations where it can be of great use and where no other means to collect accurate information about the union's status is generally available.

After petitioner Allentown Mack Sales and Service, Inc. ("Mack") bought a truck dealership and repair shop in December 1990, it hired 32 of the previous owner's 45 unionized employees. Mack soon acquired a great

deal of evidence that Local 724 of the International Association of Machinists and Aerospace Workers AFL-CIO ("the union"), which represented those workers, had suffered a substantial loss of employee support. For example,

- In July 1990, a bargaining unit employee and union shop steward, Dennis Wehr, stated that after the new company took over "we didn't have to have a union, because we didn't need one" (Pet. App. 49);
- In December 1990, employee Rusty Hoffman stated that he would vote out the union and that if the new company was going to be union he did not want to work there (*id.* at 50);
- In a job interview with the new company, employee Joe McKilvie stated that he was against the union and that "we would work better without one" (*ibid.*);
- Also in job interviews, employee Milt Solt said that he considered the union a waste of $35 a month, and employee Dennis Marsh stated that he was not being represented for his $35 union dues (*ibid.*);
- In their job interviews, employees Tim Frank, Scot Murphy, and Kermit Bloch each stated that they did not want the union (*id.* at 51);
- Bloch, who worked the night shift, also stated that none of the five or six employees on the night shift wanted the union (*ibid.*);

- At his interview, employee David Baker said he had "no use for" the union (*id.* at 52);
- In December 1990, employee and union shop steward Ron Mohr stated that, "with a new company, if a vote was taken, the union would lose" (*id.* at 53).

On the basis of this substantial evidence that employees were dissatisfied with their bargaining representative, Mack polled employees in February 1991 to determine whether the union continued to enjoy majority support. As the Board decision in *Struksnes* requires, Mack gave its employees advance notice of the poll, "informed [employees] of the purpose of the poll," gave employees "assurances against reprisals," and implemented the poll "by secret ballot conducted by an independent third party." Pet. App. 59. Thus, the Administrative Law Judge found, the poll "was conducted within the guidelines of *Struksnes*" and not "in a coercive atmosphere." *Id.* at 58-59; see also *id.* at 60 (there was "nothing in the evidence * * * to indicate that there was anything questionable or coercive about the poll").

The poll fully justified Mack's suspicion, based on repeated statements of discontent by employees, that the union might have lost majority support. Only 13 of the 32 bargaining unit members—40 per cent—voted in favor of union representation. Pet. App. 2. Because the poll provided concrete evidence of the union's minority status, Mack refused to recognize the union as its employees' bargaining representative.

In the circumstances of this case, polling served a critical function. Absent the poll, Mack could not have

refused to bargain with the minority union. At the time the poll was conducted, the Board and court of appeals held, Mack did not have objective evidence that the union had lost the support of the majority. In consequence, Mack could not lawfully have withdrawn recognition of the union or sought a Board-conducted RM election. Without the poll, which allowed Mack to gather concrete, reliable data about the level of union support, Mack's employees would have continued to be represented by a union they did not want, and Mack would have had to continue to bargain with a minority union, in conflict with its own economic interests. Nevertheless, the Board and the court of appeals held that the poll and subsequent refusal to bargain were unlawful because the evidence Mack had when it took the poll did not give rise to a reasonable doubt that the union continued to enjoy majority support.

Judge Sentelle in his dissent accurately described this result as "bizarre" (Pet. App. 15), concluding that it was "arbitrary and capricious of the Board to find that [Mack] committed unfair labor practices in the face of overwhelming unrefuted evidence that the union lacked majority support, including a poll taken with the utmost in safeguards for fairness and objectivity." Pet. App. 18. ATA can imagine no valid purpose that is served by preventing an employer from conducting a poll in the circumstances of this case and then withdrawing recognition of the union when the poll shows that the employees do not want the union as their bargaining representative. Polling in this case worked just as polling should: to accurately determine the status of a union when there is evidence of loss of support but no other means readily available to the employer to gauge whether the loss of

support is so extensive that the union no longer commands a majority.

Ostrich-like, the Board seems intent on sticking its head in the sand so that it does not have to confront reliable information that a union no longer has the support of bargaining-unit employees. The Board's refusal to allow the collection of accurate information that serves employer and employee interests is, as Judge Sentelle remarked, "divorced from logic and from common sense." Pet. App. 15. The Board should carry a particularly heavy burden of justification when it tries to suppress reliable information and the means of gathering it. But far from meeting that burden, the Board has never produced even a plausible explanation of why highly accurate information about a union's majority status should be avoided and suppressed. ATA urges this Court to confirm that polling is indeed a legitimate information-gathering tool for an employer in possession of objective evidence that a union has suffered a significant loss of support, and hence to reverse the judgment below.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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April 1997